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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

THE KANSAS CITY SOUTHERN RAILWAY COMPANY ..... *Petitioners*

v. No. 231

ARKANSAS COMMERCE COMMISSION AND ARKANSAS ASSESSMENT COORDINATION DEPARTMENT ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT ARKANSAS COMMERCE COMMISSION, IN OPPOSITION

HARRY E. McDERMOTT, JR.,
Justice Building
Little Rock, Arkansas
Counsel for Respondent

PARAGON PRINTING CO., LITTLE ROCK

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OPINION BELOW

The decision of the Supreme Court of Arkansas dated April 13, 1959, appears in the Petition at pages 25-38.

JURISDICTION

Respondent contends jurisdiction of this Court is not invoked.

QUESTION PRESENTED

The question presented is whether any title, right or privilege of petitioner under the Constitution of the United States has been denied and whether reason exists for the granting of the Writ of Certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The alleged statute and constitutional provisions involved herein are set forth in Appendix "C", Page 34 of Petitioners brief.

STATEMENT

This appeal challenges the decision of the Supreme Court of Arkansas, dated April 13, 1959.

The original assessment fixed by the Director of the Arkansas Assessment Coordination Department against appellant's properties for the year 1957 was $4,330,680.

Appellant filed petition for review of the assessment before the Arkansas Commerce Commission on April 3, 1958, the said Commission affirmed the assessment.

On October 14, 1958, the Pulaski Circuit Court entered judgment affirming the order of the Commission. Appeal was taken and entered modifying the judgment of the Circuit Court.

Petition for Writ of Certiorari has been filed herein.

ARGUMENT

The issue in the present case is uniquely narrow and under no interpretation can it be converted into one warranting review by this Court on certiorari. This matter involves only one tax payer. The circumstances are peculiarly different from others in the industry. On the facts presented, the Supreme Court of the State of Arkansas was manifestly correct in its interpretation. There is no asserted conflict of decision nor in line of the legislative history of the Statutes involved could any other result have been reached. There is no Federal question.

I.

THE DECISION BELOW IS CLEARLY CORRECT

The same arguments advanced for reasons of allowance for writ were made before the various Commissions and Courts in the State of Arkansas and were rejected. These same arguments are answered herein in the order in which they are advanced in the petition.

1. The Court Did Not Err in Refusing to Direct Appellees to Allow Depreciation of RCN D for the Year Preceding the Assessment Year

The court below took into consideration petitioners agreement. In fact, it held the Department could not add $1,462,657 which represented new additions (Page 27, Pet. Brief, Appendix A). In fact, it is the contention of the respondent that the Petitioner was given more credit on this point by the court than the other carriers received.

2. There was no Error in Refusing to Direct Deduction of Economic and Functional Obsolescence.

Essentially the appellants theory is that after all depreciation is figured and taken from the reconstruction costs, then an economic and functional obsolescence figure must be arrived at, and this figure too, deducted from unit value. The Supreme Court in overruling this same argument stated as follows (pages 27-28, Petitioner's Brief, Appendix A):

> "The Railroad contends that 25% should be deducted from the RCN-D value because of functional and economic obsolescence. It is claimed that if the Railroad were to be reconstructed only 37% of the stations and office buildings would be required; that only 47.60% of other buildings would be needed and there would be reconstructed only 44.67% of its shops and engine houses, etc.; that 500,000 net tons of revenue traffic per year is obsolescent and unprofitable; and 4.22% of its total system trackage is obsolescent; that a total of 25% of its property is obsolescent due to functional and economic factors. Undoubtedly functional and economic obsolescence is reflected in both the stock-plus-funded-debt method and the capitalized earnings method of valuation. In both of these methods the Railroad received the benefit of both functional and economic obsolescence. In 1944 a report of the National Tax Association made to a Congressional Committee said: 'It is largely because earnings and stock and bond values reflect the obsolescence which railroads have suffered as a result of over optimism and the advent of competitive transportation agencies that they are regarded as the most reliable evidence of unit value.' And in *Bailey* v. *Megan*, 102 F. 2d 651, it is said: 'A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings.'

"If the functional and economic obsolesence is deducted from the RCN-D valuation, such deduction would have to be considered in connection with the other two methods of arriving at a proper valuation. It would hardly be fair that such obsolescence be used where it is to the Railroad Company's advantage, but not be used in an approved formula when to the disadvantage of the Railroad. If the RCN-D value were the only method used in arriving at the valuation for tax purposes, perhaps the deduction for obsolescene would be required. But it must be remembered that this method is only one part of a three-part formula, and the obsolescene is reflected in two of the parts to the advantage of the Railroad. The RCN-D valuation is considerably more than the stock and debt value, but it is only slightly more than the income value. According to appellant's contention with regard to functional and economic obsolescence, the RCN-D value should be about $30 million less than the income value and about $15 million less than the stock and debt value. Such value contended for by appellant apparently would be out of all proportion to the real value as reflected by the other parts of the formula used."

2. *There was no Error in Refusing to Deduct the So-Called Non-Operating Properties Included in the Interstate Commerce Commission RCN-D.*

The petitioner contends that the so-called non-operating properties should have been deducted from the Interstate Commerce Commission RCN-D. These alleged non-operating properties are identified as the Port Arthur Canal & Dock, the Maywood & Sugar Creek Ry. Co., the Texarkana Union Station Trust, and the Naches Bridge Company. The petitioner has been given credit for the Texarkana Union Station Trust for the reason that this particular property is separately assessed in the State of Arkansas. The other properties are not separately assessed in the State of Arkansas. No proof has been of-

fered to the Department, to the Commission, nor to the Court, that these properties are non-utility. The fact that the figures are included in the RCN-D by the Interstate Commerce Commission clearly shows that the properties are utility properties and used for rail purposes.

The Supreme Court on this matter had this to say (page 29, Petitioner's Brief, Appendix A):

> "Appellant says that the Department was in error in refusing to deduct from the RCN-D valuation certain properties which it claims are non-operating, and certain improvements. The Department did allow a deduction for some non-operating properties and on the others mentioned there is substantial evidence that they are not to be classed as non-operating, and that public improvements were deducted."

4. *Working Capital and Materials and Supplies Properly Treated.*

The Arkansas Supreme Court held that the respondent properly handled working capital, materials and supplies. In so holding the Court stated:

> "Appellant maintains that the Department charged the Railroad with a working capital of $3,168,476, which is 12½% of its operating expenses for the previous year, the amount needed by the Railroad for a 45 day period, and that as a matter of fact it actually requires no working capital, because its daily revenues are sufficient to meet its needs in that respect. Whether the Railroad needs working capital is a question of fact. Evidence was introduced to prove that the same method of determining the required amount of working capital is used for every Class I railroad in the State, and we cannot say that the Department was in error in the finding that some working capital is required for Class I railroads."

5. Respondent did not Err in Using 5.75 Capitalization Rate.

The capitalization rate used by Respondent was entirely proper and supported by the evidence. The Court in so holding stated:

> "Appellant next argues that 5.75% should not be used as a capitalization rate. In the Frisco case, a 6% capitalization rate was approved, and this was before taxes. Here, the 5.75% rate is after taxes. If 6% before taxes was reasonable in the Frisco case, certainly it cannot be said that in the case at bar 5.75% after taxes is not justified.
>
> "The next point raised by appellant is that the Department erred in failing to exclude current liabilities and unadjusted credits from the stock and funded debt method of determining value, and we think appellant must prevail on this point. Included in the stock and funded debt valuation are current liabilities and unadjusted credits. Ark. Stat. Sec. 84-606 provides that the assessing authorities 'shall ascertain as nearly as it can and shall consider the market or actual value of all outstanding capital stock and funded debt'. The current liabilities and unadjusted credits in question are not part of the funded debt. They consist of such items as 'traffic and car service balances between appellant and various other companies, audited wages and miscellaneous accounts payable, which include employees' payroll allotments for U.S. Savings Bonds,' and various prudentially accrued taxes, both federal and state, and employees' withholding taxes, railroad retirement, etc., interest matured but unpaid on bonds which have been called as far back as 1945 but holders of some coupons have not been located and they cannot be paid by the trustee who holds the funds in New York,' etc. Appellee points out 'that under the provisions of Sec. 64-605 the Department is directed to include in the valuation every element that adds value to the property'. We fail to see how

current liabilities and unadjusted credits can be considered as adding value to the railroad. Just the opposite effect would appear to be more reasonable. The fact that an engineer or conductor had not cashed his check does not make the railroad worth more."

6. *Respondent did not Err in its Deduction for Non-Operating Properties.*

Respondent allowed property deduction for non-operating property. The petitioner contended that the respondent used $39 million plus for non-utility property wherein the amount deducted should have been $88 million. This is an argument that the market value of the assessment of the L. & A., a separate corporation, should be deducted rather than the stock. The Supreme Court correctly answered petitioner's argument and in so doing stated:

"Appellant owns practically all of the stock of the L. & A. Railroad, which is a separate corporation and is assessed and pays taxes as such. The L. & A. pays taxes on a valuation of $69 million. Since L. & A. pays its own taxes, appellant says it (Kansas City Southern) should have a credit to the extent of the full value on which L. & A. pays taxes, namely, the value of $69 million. The Department allowed a valuation of $18 million on L. & A. It is the contention of the Department that appellant is entitled only to a deduction for the value of the L. & A. stock owned by Kansas City Southern. The Department reached the correct conclusion. Insofar as L. & A. is concerned, Kansas City Southern owns only the stock. If Kansas City Southern had to pay taxes on this stock, certainly it would have to pay only on the value of the stock. But, since Kansas City Southern does not have to pay taxes on the L. & A. stock, the Department having classed it as a non-operating asset, only the value of what

Kansas City Southern owns should be deducted, and that is the value of the stock."

7. The Court did not Err in Failing to Direct Respondents to use the Allocation Factors Computed by Petitioner.

Part VII of petitioner's brief is concerned with the allocation of the Arkansas portion of the unit value to the taxpayer. The respondent found this to be 16.21% while the petitioner contends this should be only 13.41%. Witness for the Department testified that the same method and the same formula was used with reference to the allocation of unit value to the State of Arkansas to this railroad, as was used with reference to other railroads (T. 2,112). Simply stated, petitioner arguments are that this particular method and formula should not be used as to it for the reason that other factors should be used which would be more advantageous such as originating and terminating traffic.

The Supreme Court, after careful study of this matter, determined that the respondents had properly treated this item. (Page 31, Appendix A, Petitioner's Brief.)

"Finally, appellant contends that the Department erred in equalizing appellant's unit value at 20%; that other property in counties in which appellant operates is assessed from a low of 13.82% to a high of 18.08%; that all utilities have been assessed at 20%. In the Frisco case, we said: 'We recognize that obtaining a fair assessment of property has been a serious problem in this State for many years; but we know that considerable headway has been made toward more equitable assessments. Act No. 153 of the Legislature of 1955 shows the labor that the State is undertaking in this regard; and in Sec. 4 of that Act the same figure of 20% is used.' Some classes of property in Arkansas are assessed at more than 20%; other classes are assessed at less than 20%; but the State is striving

for a 20% figure. In this case Frisco has failed to show either that the Commission was in error in fixing the figure at 20%, or that the said figure was arbitrary, or that the said figure would result in confiscation.' Likewise, in the case at bar we do not think the appellant has shown that the Department was in error or that a basis of 20% would result in confiscation."

II

THERE IS NO CONFLICT OF DECISION

The petitioners do not contend that there is any conflict of decision on the questions presented in their petition. They cite no authority or make any argument whatsoever that the issues presented herein have been decided in other cases and that different conclusions reached.

It is the contention of the respondents that there is no conflict of decision and no reason for this court to grant *certiorari* based upon any alleged conflict of decision.

III

THERE IS NO QUESTION OF FEDERAL LAW

Petitioners contend in its brief that the jurisdiction of this court is invoked by reason that a right and privilege was specifically claimed under the constitution and Statutes of the United States, and denied.

The only right alleged to have been denied is that of due process. In its brief in the Supreme Court of Arkansas, Petitioner never mentioned the Constitution of the United States. Only in regard to some of the points raised herein did it make any allegation that even sounded like an attempt to raise a constitutional question. A typical allegation can be found on page 205 of Petitioners Arkansas Supreme Court brief which states:

> "The failure of the Court below to require the department to omit and deduct the full value of these now-operating properties from its RCN-D constitutes a confiscation of the appellant's property without due process of law to the extent not deducted."

Petitioner did not then or does not now allege any facts that would constitute a denial of due process under the Federal Constitution.

Whenever, by the laws of a state, or by state authority, a tax is imposed, and those laws provide for a mode of conforming or contesting the charge thus imposed in the ordinary course of justice, with proper notice; due process is afforded. *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U.S. 112, 41 L. ed 369, 17 S. Ct. 56; *Davidson* v. *New Orleans*, 96 U.S. 97; 24 L. ed 616.

The mere fact that a person is unsuccessful in a court in a matter involving, life, liberty, or property does not show that there has been a violation of the due process of law guaranty. *Golta* v. *Weeks*, 271 U.S. 536, 70 L. E. 1047, 46 S. Ct. 613; *Palmer* v. *Ohio*, 248 U.S. 32, 63 L. ed. 108, 39 S. Ct. 16.

It is well settled that an *ad valorem* tax may be levied on an interstate carrier without violation of the Fourteenth Amendment. *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590, 98 L. ed 967, 74 S. Ct. 757.

Simply stated petitioner did not, and has not to this court, presented a federal question.

CONCLUSION

It is submitted that the Arkansas Supreme Court opinion below is correct; all similar situated taxpayers were treated the same as the Petitioner; there is no conflict of Decision; no federal question exists; and the Petition for certiorari should be denied.

Respectfully,

HARRY E. MCDERMOTT, JR.,
Justice Building
Little Rock, Arkansas
Counsel for Respondent

Certificate of Service

I, hereby certify I have mailed copies of the brief to all attorneys of record.

HARRY E. MCDERMOTT